IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

KEVIN DAMEL JOHNSON,	
Petitioner,	**No. 99CV4030-DEO**
vs.	**ORDER**
JOHN AULT, Warden,	
Respondent.	

This matter is before the Court on a Title 18 U.S.C. Section 2254 motion in this Court. The Court has held several hearings in this matter and now denies the petition for relief by the petitioner here.

The Court is persuaded that a chronology would be helpful in better understanding this cause. The following chronology is appropriate based on the evidence before the Court.

Chronology - Kevin Johnson

Aug. 27, 1993: Defendant allegedly commits burglary, assault etc.

Sept.1, 1993: Defendant allegedly commits burglary, assault, etc.

Case #45091

Counts I, II, III - incidents on Aug. 27, 1993 (went to trial - guilty)

Counts IV - VIII - incidents on Sept. 1, 1993 (these counts dismissed before trial)

Case #45092

All Counts - incidents on Sept.1, 1993 (Went to trial. Defendant acquitted.)

Jan. 4, 1994: Motion to Suppress hearing...defense counsel Greg Jones states he has an alibi witness who potentially impacts both cases (David Jackson)... on p.40 of Greg Jones's deposition, he states that alibi witness David Jackson would only help as to the Sept. 1, 1993 charges (which at one time were under both case #'s)

Jan. 4, 1994: Greg Jones files a "Notice of Defenses" listing David Jackson as a potential alibi witness in both criminal case #'s 45091 and 45092.

Jan. 26, 1994: Jury acquits Johnson on Sept. 1, 1993 charges (case #45092)

Feb. 9, 1994: Johnson convicted for Aug. 27, 1993 charges (case #45091)

April 28, 1995: Iowa Ct. Appeals affirms Johnson's conviction

Jan. 3, 1996: Johnson files application for post-conviction relief

Mar.10, 1996: Post-conviction hearing held in Iowa Dist. Ct. Woodbury Cty. and district court subsequently denies relief

May 4. 1998: Iowa Supreme Court affirms the district court's decision on post conviction relief.

June 11, 1999: Johnson files §2254 in federal court

On September 6, 2001, this Court entered an Order (Docket No. 57), setting out that it was persuaded that an evidentiary hearing should be held in relation to the issue of whether or not the petitioner here, Mr. Johnson, has a valid claim for ineffective assistance of trial counsel because trial counsel did not call one David Jackson as an alibi witness during Johnson's state court trial in Case No. 45091 (August 27th, 1993).

This Court did hold a hearing to evaluate the evidence in relation to whether or not the petitioner's hope to have Mr. Jackson testify as an alibi witness was carefully considered by the state courts and/or whether or not the evidence in the state court was sufficient so that this Court could fairly rule on the matters before it.

There were bottom line, important facts that needed to be clarified even if by sharply conflicting testimony. On the record before it, prior to the hearing, this Court could not reconcile these contrary statements. As an example, on page 56 of trial counsel's deposition, taken on March 10, 1997, trial counsel stated that the potential alibi witness, David Jackson, did not give him any information regarding the whereabouts of

the defendant on August 27, 1993. That statement, however, is refuted by the petitioner on page 13 of the transcript of the hearing held before this Court on July 6, 2000, and further supported by live testimony of the petitioner at the recent hearing. On page 56 of trial counsel's deposition, he again states that David Jackson never told him anything about the whereabouts of the defendant on August 27, 1993. This statement, however, is refuted by the testimony of David Jackson on pages 17, 18, and 19 of Jackson's deposition, taken on October 4, 1996. This Court was persuaded that it was imperative that trial counsel, petitioner Johnson, and alibi witness David Jackson all be available for a hearing before this Court so that each of them could be heard by the others with their counsel and this Court asking what each of them knew about the possibility of David Jackson being an alibi witness for the case involving the August 27, 1993 incidents (Case No. 45091). This Court was persuaded that what each of them said to one another, or both the others, and any pertinent information that could be brought out at such a hearing would allow this Court to be much more informed, which would enable it to properly rule on the overall petition.

In the Iowa District Court's Order on page 3, it discusses the alibi witness, David Jackson. It sets out that counsel for Johnson questioned the alibi witness' credibility because Jackson, the witness, said that he had talked to Johnson about the alibi before Johnson's counsel interviewed him and because the defendant Johnson gave conflicting accounts of where he was before the September 1 incident. Johnson's trial counsel was persuaded that Jackson could give a potential alibi for the charges related to September 1, 1993 but trial counsel felt that witness Jackson did not have credible evidence concerning the incidents that took place on August 27, 1993.

The Iowa Court states as a conclusion on page 3:

> If Jones would have been told by Jackson that Jackson had an alibi for August 27, 1993 incident, Jackson would have been called as a witness by Jones [trial counsel.]

This, of course, is a statement by trial counsel that has been adopted by the Iowa Court but one that is strongly contested by Jackson and Johnson who both say that Jackson was ready, willing, and able to testify. They both say that he was ready to appear at the trial; that he was ready to give a good alibi for the incident on August 27, 1993; and, that Johnson's

counsel told Jackson that he did not need him and then sent Jackson home. It is contended that Johnson's counsel told Johnson, "Jackson is out in the hall, ready to go, but we don't need him." The Iowa District Court also concluded that "[e]ven Jackson's statement to [Johnson's counsel] about the September 1, 1993 incident amounted to an alibi only from 2:00 a.m. to 10:00 a.m." (Iowa District Court Order at 3-4). This clause was pure dicta. Petitioner in this state court case had no pending charges that were supposed to have happened on September 1, 1993. The fact that the District Court found his alibi for that day was perhaps shaky and should not be a consideration as to what the truth was on August 27th, 1993. The Iowa Court also concluded that Johnson's counsel was not ineffective for failing to call Jackson as a witness when Jackson's alibi testimony "related to a different date." Jackson and Johnson both dispute this. Id. at 6. The fact that Jackson says this is not true in a post-trial deposition is concluded by the Iowa Court to be, "tentative at best," and Johnson's counsel's "testimony on this issue is credible." Id.

Johnson's post-conviction relief next came up before the Supreme Court of Iowa. The Iowa Supreme Court on page 3 of its

Order dated May 4, 1998, discussed the alibi matter and stated:

> We conclude that counsel was not ineffective for failing to call Jackson as a witness. Jones was certain that Jackson's alibi related to the September offenses, which were dismissed. Therefore, it was not a breach of essential duty to testify at Johnson's trial on charges for offenses alleged to have occurred on August 27, 1993. Moreover, even if we believed Jackson would have attempted to provide an alibi for the August offenses, Johnson cannot show prejudice occurred as a result of counsel's failure to call Jackson as witness.

It should be noted that at the post conviction relief hearing, Johnson did not hear what trial counsel said, nor was trial counsel present at Jackson's deposition.

The Iowa District Court in ruling on the post conviction relief application set out on page 6 of its order as follows:

> Jones was not ineffective for failing to call Jackson as a witness when Jackson's alibi testimony related to a different date then the date of the alleged crime being tried. The credible evidence shows that Jackson was interviewed by Jones but that Jackson's testimony would not be helpful to Johnson. Jackson's post-trial deposition testimony is tentative at best. Jones' testimony on this issue is credible.

The Supreme Court of Iowa in denying Johnson's post conviction relief states on page 2 of its order as follows:

> Kevin Johnson appeals the district court's denial of his application for postconviction

relief from his 1994 convictions of second-degree burglary, assault while participating in a felony, and assault with intent to commit sexual abuse. He argues the court erred in assessing the credibility of a witness and in finding his trial counsel did not provide ineffective assistance. We affirm.

In a single trial information, Johnson was charged with three offenses alleged to have occurred August 27, 1993 (second-degree burglary, assault while participating in a felony, and assault with intent to commit sexual abuse) and five offenses alleged to have occurred on
September 1, 1993. He was convicted of the August offenses and the September offenses were dismissed.

Johnson appealed and in 1995 his convictions were affirmed by our court of appeals. In January 1996, Johnson filed an application for postconviction relief alleging, among other things, that his trial counsel provided ineffective assistance by failing to present alibi witness David Jackson.

After considering the deposition testimony of Jackson and the in-court testimony of Johnson and his trial counsel, Gregory Jones, the district court denied the application. The court concluded that the credible evidence showed that when Jones interviewed Jackson, Jackson "related facts to Jones that indicated a potential alibi for the September 1, 1993 offenses but not the August 27, 1993 offenses." The court specifically found Jackson's posttrial deposition testimony that Johnson, a lifelong friend, was sleeping at his house on August 27, 1996 [1993 sic], to be "tentative at best." It concluded Jones was

> not ineffective for failing to call Jackson as a witness at Johnson's trial.
>
> On appeal[,] Johnson argues the district court erred in its assessment of Jackson's credibility. Johnson further argues the district court erred in finding his trial counsel was not ineffective for failing to call Jackson as a witness.

In the petitioner's pro se pleadings to the Court, the petitioner sets out that the basis for his appeal is:

> There was an alibi [witness] named David Jackson who was ready and willing to testify that I had nothing to do with this crime. See January 4, 1994, Motion To Suppress.
>
> [Further,] that my [trial attorney] assured me that David Jackson was outside the courtroom, waiting to testify, when in reality, [trial counsel] had phoned David Jackson and told him not to [appear]. [See Petitioner's testimony at recent hearing, plus deposition of October 4, 1996].

The Court has set out the various "primary issues" in each step of the proceedings so that it can be clearly shown that the problem is, as shown by the chronology, that there were two (2) separate cases. Case No. 45091, which had three counts in it alleging crimes that had happened on August 27, 1993, and four counts in relation to incidents that happened on September 1, 1993, and case No. 45092 which had a number of counts, all

alleging crimes to have occurred on September 1, 1993. This case went trial. The defendant was acquitted, therefore this case really has no bearing on this petition for relief except for the fact that it helped to create the confusion as to dates which was clearly evident during the testimony at the recent hearing.

In Case No. 45091, as mentioned above, there were four counts alleged to have occurred on September 1, 1993. Before the trial, these four counts were dismissed. So, Case No. 45091, as it was tried, only involved incidents on August 27, 1993.

Trial counsel, after interviewing the alibi witness Jackson, has previously testified that he felt that Jackson had a reasonable position in relation to providing an alibi for September 1, 1993. However, trial counsel has flatly claimed that neither the alibi witness, or the petitioner here, ever talked to him about an alibi for the petitioner for the incidents that took place on August 27, 1993.

As mentioned above, this contention was hotly contested in this Court by depositions and other statements. Therefore, as set out above, this Court felt it was necessary to have each of

these three (3) people, the petitioner, his alibi witness, and trial counsel all appear at the same time so that they could each hear each other, and what they had to say, for the first time, and because of this confrontation situation, it would give this Court some chance to come up with a well considered decision in this case.

One of the basic bits of evidence involved what is known in state court as a, “Notice Of Defenses.” In Case No. 45091, the trial counsel filed a “Notice Of Defense” which said in basic part:

> Pursuant to Iowa Rules of Criminal Procedure, Rule 10(11), the defendant hereby notifies the State and the court that the following defense(s) may be relied upon by the defendant in the trial hereof:
> [The following was written in long hand]
> Alibi, defendant asserts he was at 1614 B. Street, South Sioux City, NE, at the time alleged for the crimes. David Jackson, 810 Omaha Street, Sioux City, Iowa.

In Case No. 45092, the same “Notice Of Defense” was filed, and it stated in pertinent part:

> [Written in long hand] Alibi David Jackson 810 Omaha St., Sioux City, IA. Defendant asserts he was at 1614 B. Street, South Sioux City, NE. [At the time of the crime].

Trial counsel admits that he filed both of these, “Notices

of Defense" and included David Jackson, the "alibi witness," on both of these notices of defense. Trial counsel states that he listed David Jackson as a witness or at least a potential witness in both cases because he believed Jackson did have pertinent information about the crimes involved on September 1, 1993, and at the time of filing the notices, both cases had counts involving that date. He now says that he did not believe that David Jackson and the petitioner here, Johnson, were credible and that what they knew and what David Jackson would say should not be heard by the jury in the case involving incidents of August 27, 1993, Case No. 45091.

At the hearing held, this Court asked trial counsel if he regularly refused to use a witness that he himself was not persuaded was telling the full truth as he had done in Johnson's trial. He stated that he had so acted feeling that he could not present David Jackson as a witness because of his uncertainties about Jackson's truthfulness. He was asked whether or not this was an infringement on the jury's duties and whether or not they were supposed to decide credibility? He agreed that that was certainly the usual thing. There is no doubt that if trial counsel for either side of the case is reasonably sure that one

of the proffered witnesses is about to commit perjury, there are a number of rules and decisions which require that trial counsel take certain steps to bring this matter to the attention of the court. Johnson's trial counsel didn't bring that situation to the attention of the Court, he decided on his own that Jackson wasn't going to testify. This Court, after hearing all evidence, is persuaded that trial counsel should not have been making such a decision but should have brought the Court into it.

The matters that came up at this Court's hearing that challenged the findings of the Iowa District Court and the Supreme Court of Iowa were presented by the petitioner who contended that this Court need not show deference to the rulings of those courts in every instance. Counsel for the petitioner stated that because of the inappropriate decision of trial counsel, who had decided that the alibi witness was not worthy of being heard by the jury, important defense evidence was not presented. The petitioner contended that the one hope that he had was that David Jackson would make a good alibi witness for him. He further argued that this Court should grant the petition because his good defense never got presented to the

jury and that this entitles the petitioner to relief.

The petitioner, Johnson, testified that at the time the trial was going on that trial counsel approached him and said that the prosecutor had agreed to a plea bargain for a five-year sentence. Petitioner said that he flatly told trial counsel that he was not interested in such a plea bargain and that thereafter, trial counsel was “mad.” The petitioner said he later asked trial counsel where David Jackson was, and that trial counsel answered, “He is outside. We won’t call him until later.” Petitioner says that the facts show that David Jackson wasn’t really out in the hall because trial counsel had told him not to come. Petitioner says that trial counsel then later told him that he was not going to call David Jackson because the state had, “not put on any evidence.” This Court is sure that since there were two trials, almost back to back, that these comments did occur, but neither the petitioner here or his trial counsel (in both cases) has fully persuaded this Court that when they now recall these conversations they are talking about the first or second trial. During proceedings in this Court, the petitioner asked a pertinent question of why trial counsel filed a, “Notice Of Defense,” naming the alibi witness

Jackson on both cases and saying in open court that Jackson was a good alibi witness, and then later on saying that Jackson was not a good witness. The petitioner said he could not understand how Jackson could have turned from a good witness into a bad witness without anything else intervening. No clear explanation of this was brought to this Court's attention by trial counsel for the petitioner.

In the cross-examination of trial counsel, he was asked about a statement that he had made in his previous deposition, (page 55, lines 23-25, p. 57, lines 21-22) where he admitted that he did tell the trial judge (Tr. p. 7, line 23, January 4, 1994) in open court that he had a credible alibi witness for both cases. Trial counsel stated during the testimony at our hearing that he was not talking about alibi witness Jackson at that moment. This Court finds this testimony hard to accept because the only witness that was listed on both, "Notices Of Defense," was Jackson. The trial court was talking about alibi witnesses when trial counsel said that this was not Mr. Jackson that he was speaking about. This just did not track, and this Court is not persuaded that trial counsel was deadly accurate when he made that answer.

The scenario this Court envisioned in ordering that trial counsel, the petitioner, and the alibi witness Jackson all appear so that they could each hear what each other had to say and would be able refute, challenge, and cross-examine each other did not work out. Jackson did not come to the December 14, 2001 hearing. Counsel for the petitioner had informed this Court sometime back that he had been in contact with alibi witness Jackson and that Jackson had agreed to come and testify. There are several statements in Jackson's post-conviction deposition that directly challenge trial counsel's statements concerning whether or not Jackson could provide a good alibi for the August 27 incidents; whether or not Johnson and his trial counsel had talked about this; and, whether or not Jackson was available and ready to testify at the trial, but as mentioned, trial counsel wasn't asked about Jackson's deposition and had never been asked key questions about Jackson's claims. Trial counsel was asked these key questions at our recent hearing. He either denied them or said "I don't remember." That is when Jackson should have been present.

This Court had discussed these matters in other hearings with these parties; but, as mentioned, felt that the weight of

the evidence was a “stand off” and that the only way it could be reconciled was by having them all together. As mentioned, Jackson was not there. His positions as set out in his deposition several years earlier were fully known by the Court and the parties, but these were not going to help the Court get to the nub of the matter. This Court had this “stand off” problem before the latest hearing and said so and precisely set out some of the examples of what the problems were. When Jackson did not show up, there was no chance for this confrontation. It had been a tie before the hearing, and certainly petitioner and trial counsel made some points. But, they still did not answer the bottom-line tough questions of what went on between trial counsel and Jackson.

A problem Jackson and the petitioner had never before had a chance to address arose when a witness named Joel McGee, who was the owner of the Fun World were Jackson was said to have worked on August 27, appeared as a witness and said that Jackson usually started working at 1:00 p.m each day, that he usually didn’t show up until about 12:45 p.m., and that 11:30-12:00 was the earliest he had ever shown up for work at Fun World. The Court is aware that the evidence here shows that the incidents

which allegedly took place on August 27 happened early in the morning. The testimony that Jackson had made at the post-conviction hearing was that he had gotten up around 5 o'clock in the morning and saw the petitioner, Johnson, sleeping on the floor of his home when he left to go to work. It would have been very important for Jackson to have been at our hearing to listen to what Joel McGee had to say and then respond.

The Court is not persuaded that the unanswered McGee testimony "carried the day," but it certainly did not help the petitioner's position.

This Court stated earlier that there was confusion as to the dates of August 27 and September 1. They are only four (4) days a part, and this Court is not persuaded even though it listened very carefully, that any witness was absolutely sure that what they were talking about had to have been on one or the other of those days. This Court was never persuaded that any witness had those trials clearly and separately in mind each time they spoke.

The bottom line is that in the case of Sumner v. Mata, 449 U.S. 539, 544-45 (1981), the Supreme Court of the United States sets out as follows:

Section 2254(d) provides:

“(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of

> the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
> "And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

As set out in the above quote, it is clear that the state court's are courts of competent jurisdiction and that what they set out in a written opinion shall be presumed to be correct unless the petitioner can establish one or more of the eight (8) exceptions listed above.

This Court was well aware of, Sumner v. Mata, prior to the recent hearing, but was persuaded that if all three (3) of these individuals, trial counsel, the petitioner here, and the alibi

witness Jackson, showed up, and everyone had a chance to make sure that they knew what the others were saying, that we might develop a situation which would allow this Court to conclude that one or more of these eight (8) exceptions were present in this case.

This Court was not prepared to, without a hearing, automatically grant the state court the presumption of correctness that they are entitled to under Sumner v. Mata. Without this confrontation, this Court is persuaded that the petitioner here has not established any one of the eight (8) above listed exceptions where Mata and/or the code section do not apply and presumptions are not controlling.

This Court had been persuaded, before our latest hearing, that an expansion of our record might put petitioner Johnson in one or more of the situations (i.e., numbers 1, 2, 3, 6, or 8) listed above from Mata and Title 18 U.S.C. Section 2254(d).

In absence of the alibi witness, Jackson, this Court could not expand the relevant record by statements made from any of the three (3) so as to have this situation fall under one of the above-set out "exceptions" to Mata and the statute. It may not be fair to rule that the petitioner loses because he could not find Jackson, but as set out on pages 3 and 4 of this order, the

bottom line examples of controversy relate to colloquies between trial counsel and Jackson that Johnson's memory of what Jackson told him are just not sufficient to carry the required burden.

This Court has no alternative but to conclude that none of the eight "exceptions" under Sumner v. Mata, as set out above, have been established by the petitioner here.

WHEREFORE, **IT IS HEREBY ORDERED** that the petition of Kevin Damel Johnson (Docket No. 3) is hereby **denied**.

IT IS FURTHER HEREBY ORDERED that any pending motions in relation to these proceedings that have not been previously ruled on, are, by reason of the above Order, hereby **denied** as moot.

IT IS SO ORDERED this _____ day of January, 2002.

_____
Donald E. O'Brien, Senior Judge
United States District Court
Northern District of Iowa